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Immigration Litigation Bulletin

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Inside

En Banc Ninth Circuit Holds There Is No Burden Regarding Internal Relocation To Avoid Torture

For a court of appeals to *sua sponte* request views on whether a case should be heard *en banc* is rare, and *en banc* initial hearing is rarer still. So perhaps we should not be surprised when the *en banc* panel in such a case includes significant rulings to its decision. That is what happened in ***Maldonado v. Holder***, 781 F.3d 1107 (9th Cir. 2015) (*en banc*).

In its opinion, as requested by the government, the *en banc* panel ruled that the regulations on protection from torture are distinct from those on asylum, therefore no presumption of future torture arises from past torture. The court ruled that the regulations require the agency to consider all evidence of the likelihood of future torture, and that the regulations set no particular standard by which internal relocation must be demonstrated. The *en banc* court therefore overruled parts of four circuit precedents. Then, based on its reasoning that the agency is required to consider all evidence, the court ruled that neither party has any burden of proof to show whether an applicant for torture protection could relocate safely. To understand this extraordinary ruling, for which neither party argued, the context of the case is useful.

Maldonado entered the United States in 1966, and obtained lawful permanent resident status as a child. He was convicted of first degree burglary and, as a result, lost his status in 1997 and was deported to Mexico. He returned to his birthplace, where he was detained and brutalized for extortion by a criminal organization that included police. He then joined the organization, identifying recent deportees to kidnap for extortion. He re-entered the United States five

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Seventh Circuit Asserts Jurisdiction Over Denial Of Aggravated Felon's Application for Deferral of Removal

In ***Lenjinac v. Holder,*** __F.3d__, 2015 WL 1189251 (7th Cir. March 17, 2015) (*Bauer*, Manion, Rovner), the Seventh Circuit exercised jurisdiction to review a denial of deferral of removal under the CAT, reaffirming its prior holding that "deferral of removal is not a final remedy and therefore the INA does not bar judicial review."

The petitioner, a Bosnian Muslim who emigrated to the United states in 2002 and became an LPR in 2005, was placed in removal proceeding on the basis that he had been convicted of an aggravated felony, namely a drug conviction. During the proceedings he applied for asylum, withholding and CAT deferral claiming that if returned to Bosnia-Herzegovina, he would be killed by members of the military and, given his criminal history he would likely be detained and tortured while in the Bosnian prison system. The IJ

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No Burden Regarding Internal Relocation To Avoid Torture

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times, was deported, and each time returned to the same town and the same criminal employment. In 2007, petitioner was apprehended again entering the United States. The 1997 deportation order was reinstated, but petitioner applied for protection from torture in Mexico based on his fear of the organization for which he had worked.

The immigration judge denied the application because petitioner had not met his burden to show that the government would not protect him, or that it was more likely than not that he would be tortured in Mexico, particularly given Maldonado's own testimony that the criminal organization was geographically limited to one state. The Board of Immigration Appeals ruled that the immigration judge's findings were not clearly erroneous, in part supported by a citation to a Ninth Circuit precedent that had affirmed an agency finding regarding internal relocation, holding that petitioner had not shown that internal relocation was "impossible." Maldonado was deported in 2009.

After the case had been briefed, the panel requested the parties views on whether the case should be heard *en banc* to consider "(1) whether there is a conflict in our case law between *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011), and *Hasan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004), regarding which party bears the burden of proof on internal relocation; and (2) whether *Hasan* and *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008), improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is 'impossible.'"

The government responded that *en banc* hearing was not appropriate in this case. However, the government noted that there is an intra-circuit conflict on the first question, and that the Board had never held that absolute impossibility was the alien's burden of persuasion for internal relocation to avoid torture. The court granted *en banc* hearing.

In its merits brief to the *en banc* panel, the government argued that the torture holding of *Perez-Ramirez* was wrong, contrary to the regulations, and in conflict with other Ninth Circuit precedents. Under the regulations governing protection from torture, past torture creates no presumption either of future torture or regarding internal relocation, and the burden never shifts to the government. The alien must show that torture is more likely than not in the country, and the adjudicator must weigh all evidence of the likelihood of torture, including past torture and whether internal relocation from torture is possible. Regarding internal relocation, the Board had not specifically held in a precedent decision that an alien must show that internal relocation is "impossible," or any other particular standard of proof. Therefore, the government would not object if the Ninth Circuit eliminated the absolute "impossible" standard from *Lemus-Galvan*.

The court's further holding that there are no presumptions and no shifts of the burden of proof under the regulations governing protection from torture, forecloses reliance on *Perez-Ramirez* in that regard.

The court's ultimate holding on the first question, that past torture does not give rise to a presumption regarding internal relocation, was very positive. But it directly addressed only part of the government's objection to Perez-*Ramirez.* The reasoning of Perez-Ramirez was not limited to internal relocation, and aliens have argued based on that decision that past torture gives rise to a presumption of a likelihood of future torture, shifting the burden to the government to rebut that presumption. OIL's position is that the *en banc* court's further holding, that there are no presumptions and no shifts of the burden of proof under the regulations governing protection from torture, forecloses reliance on *Perez-Ramirez* in that regard.

The court's reasoning on the first question, however – that the regulations governing protection from torture required the adjudicator to consider all evidence of the likelihood of torture in the country, including whether the applicant could safely relocate – led the court to a holding that the parties had not briefed or argued. Noting that nothing in the regulation suggests that the adjudicator could deny protection solely based on evidence regarding internal relocation, the court ruled that the regulations place no burden on either party to make any showing regarding internal relocation. Therefore, not only is there not a burden on the applicant to show that internal relocation is impossible, but there is no burden on either party to make any showing regarding internal relocation.

On its face, this ruling is limited to internal relocation, and the court itself recognized that "[i]f the BIA were to provide a new interpretation of the regulations, we would give that interpretation an appropriate level of deference."

By Andy MacLachlan

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Review of Denial Of Deferral of Removal for Aggravated Felon

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only considered petitioner's CAT request because his aggravated felony conviction rendered him ineligible for asylum and withholding. The IJ determined that petitioner would more likely than not be subjected to torture if removed and therefore granted his application. Following the government's appeal, the BIA vacated the IJ's ruling holding that petitioner had not met his burden of proof, and also concluded that there was no evidence that parties in Bosnia-Herzegovina retained an intereste in harming him, or would torture him, or that he would be imprisoned for the purpose of causing him pain and suffering.

The BIA applied the proper standard when it stated that "the applicant bears the burden of establishing that it is more likely than not that he would be tortured if removed."

The Seventh Circuit disagreed with the government's position that the INA precluded review of final decisions made by the BIA for aggravated felons. The court reiterated its holding in *Wanjiru v. Holder*, 701 F.3d 258 (7th Cir. 2013), that deferral of removal is not a final remedy and therefore the INA does not bar judicial review.

On the merits, the court rejected petitioner's contention that the BIA had misstated his burden of proof. The court explained that the BIA applied the proper standard when it stated that "the applicant bears the burden of establishing that it is more likely than not that he would be tortured if removed," and that petitioner "could not meet his burden without some evidence that he would be targeted for torture or harm upon his return." The court then found that, although the BIA had accepted the IJ's finding as true, its conclusion was supported by substantial evidence. In particular, the court explained that "under the high burden for obtaining CAT protection, reports that torture occurs in a foreign country and its prisons are insufficient bases for relief without evidence that the petitioner will be tortured if he returns." Here, petitioner presented no evidence that "Bosnian prison conditions are intended to inflict pain or suffering on prisoners."

By Francesco Isgro, OIL

EOIR Releases Statistic Yearbook

EOIR has released of its Fiscal Year (FY) 2014 Statistics Yearbook. The book is a representation of data that EOIR tracked and compiled during the previous fiscal year. As in previous years, the figures and tables contained within the book examine respondents' cases by nationality, language, and disposition, and provide detailed information surrounding asylum cases.

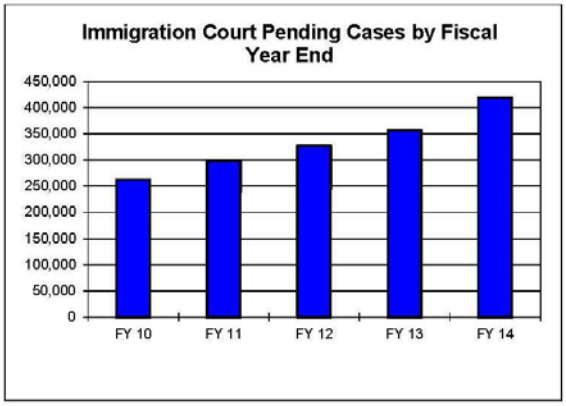
The Yearbook indicates that the number of matters the immigration courts received decreased by 5 percent between Fiscal Year (FY) 2010 and FY 2014 and has increased by 10 percent in the last fiscal year. In 2010 EOIR received 322,990, while in 2014 receipts were 306,045.

The number of matters the immigration courts completed decreased by 15 percent from FY 2010 to FY 2014. In 2010 immigration courts completed 291.310 matters while in 2014 they completed 248,078.

The number of pending immigration court cases has grown by 59 percent since the end of FY 2010, and by 18 percent since the end of FY 2013.

At the BIA, receipts have decreased 26 percent between FY 2010 and FY 2014. In FY 2010, the BIA received 40,228 cases, while in 2014 it received 29,723 cases.

The BIA completion of cases decreased by 19 percent between FY 2010 and FY 2014. In FY 2010 the BIA completed 38,089, while in FY 2014 it completed 30,822 cases.



Immigration Court Pending Cases	
End Of	Pending
FY 10	262,681
FY 11	298,088
FY 12	327,506
FY 13	356,030
FY 14	418,861

FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction – Equitable Tolling

The Supreme Court will hear oral argument April 29, 2015, on the alien's petition in ***Mata v. Holder***, in which the Fifth Circuit held that it lacks jurisdiction to review the BIA's decision denying a request for equitable tolling of the 90-day filing deadline for motions to reopen. In its response to the petition for certiorari, the government argued that the Fifth Circuit holding is erroneous. Merits briefs for petitioner and the government have been filed. The Supreme Court appointed amicus counsel to defend the judgment below.

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Conviction - Possessing Illegal Drug Paraphernalia

On January 14, 2015, the Supreme Court heard argument on the alien's petition for *certiorari* in ***Mellouli v. Holder***, No. 13-1034 (U.S.) to review an Eighth Circuit decision (published at 719 F.3d 995) holding him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on a drug paraphernalia conviction. The Eighth Circuit ruled that the BIA precedent *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (2009), is entitled to deference regarding drug paraphernalia offenses under the laws of States that have enacted the Uniform Controlled Substances Act.

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Consular Non-Reviewability

On February 23, 2015, the Supreme Court heard argument on the government's petition for certiorari in ***Kerry v. Din***, from the Ninth Circuit's published decision, 718 F.3d 856. The government presented the questions: 1) whether a consular officer's denial of a visa to a U.S. citizen's alien spouse impinges upon a fundamental liberty interest (family/marital unity) of the citizen that is protected under the Due Process Clause; and 2) whether a U.S. citizen whose constitutional rights have been affected by denial of a visa to an alien is entitled to challenge the denial in court and to require the government, in order to sustain the denial, to allege what it believes the alien did that would render him ineligible for a visa.

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Standard of Review - Nationality Rulings

The Ninth Circuit granted *en banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder***, 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and- convincing and clear, convincing, and unequivocal standards are functionally the same. On March 17, 2014, an *en banc* panel heard oral argument.

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Asylum – State Dept Investigations

The Ninth Circuit requested a government response to the alien's petition for *en banc* or panel rehearing challenging the Court's published decision in ***Angov v. Holder***, 736 F.3d 1263, which held that the alien has the right to obtain documents, identities of investigators and witnesses, and testimony of the State employees involved in the investigation of his asylum claims by the Consulate in Romania. The government opposed rehearing on May 9, 2014.

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Conviction – Divisibility Inconclusive Record

On January 15, 2015, the Ninth Circuit *sua sponte* directed the parties to file simultaneous briefs addressing whether ***Almanza-Arenas v. Holder*** should be reheard *en banc*. The panel ruled (771 F.3d 1184) that California's unlawful-taking-of-a vehicle statute is not divisible, but even assuming divisibility, the record of conviction discharged the alien's burden of proving eligibility for relief from removal and held the Board's precedent decision (*Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009)) to be erroneous. The government response is due March 30, 2015.

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Conviction – Inconclusive Record

On December 22, 2014, the government filed a petition for panel rehearing, challenging the ruling in ***Almanza-Arenas v. Holder***, 771 F.3d 1184, that the alien's conviction did not render him ineligible for cancellation of removal and adjustment of status. The court then *sua sponte* requested the parties' views on whether to rehear the case *en banc*, and on March 30, 2015, the government filed a brief urging an *en banc* rehearing if the panel did not correct its errors. The government argued the panel's decision warrants rehearing because (a) it conflicts with decisions of the Ninth Circuit and other courts of appeals that an alien is ineligible if it cannot be determined conclusively from the criminal record that the conviction was not for a disqualifying offense and the court erred in reading *Moncrieffe v. Holder,* 133 S. Ct. 1630 (2013), as requiring the opposite result, and (b) because the panel violated administrative law principles when it decided the case without addressing the agency's reasoning that the alien did not carry his burden of proving eligibility when he refused the immigration judge's request to provide a conviction record relevant to assessing whether his conviction is disqualifying.

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Updated by Andy MacLachlan, OIL

Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

■ Second Circuit Holds BIA Properly Applied Waiver Doctrine Where Alien Failed to Raise *Descamps* Argument Before Immigration Judge

In ***Prabhudial v. Holder***, __ F.3d __, 2015 WL 1061798 (2d Cir. March 12, 2015) (Jacobs, Wesley and Carney) (*per curiam*), the Second Circuit, in a question of first impression, held that the BIA may apply the waiver doctrine to matters not raised before an IJ.

The petitioner was admitted to the United States as an LPR in 1983. In 2012, he was placed in removal proceedings and charged with removability under INA § 237(a)(2)(A)(iii), (a)(2)(B)(i), by reason of three New York State criminal convictions: two for seventh-degree possession of a controlled substance, N.Y. Penal L. § 220.03, and one for fifth-degree criminal sale of a controlled substance, N.Y. Penal L. § 220.31. Petitioner conceded his convictions, and in July 2012, was found removable for having been convicted of a controlled substance violation (the possession convictions), and a drug trafficking aggravated felony (the sale conviction). The BIA affirmed the decision in October 2012, but reopened and remanded the proceedings in January 2013, after petitioner demonstrated that his sale conviction had been vacated. Later that month, an IJ found that petitioner was eligible for cancellation of removal, and in his discretion granted the relief.

In April 2014, after the previously vacated sale conviction was reinstated, DHS served petitioner with a second NTA, alleging the same charges of removability. Petitioner again admitted to the factual allegations, and conceded removability for the controlled substance convictions. He denied that he was removable by virtue of having been convicted of an aggravated felony, arguing that a case then pending before the N. Y. Court of Appeals, if decided favorably, would give him grounds to again seek *vacatur* of his sale conviction. The IJ ruled that the sale conviction was an aggravated felony, and sustained the charges of removability.

On appeal to the BIA, the petitioner raised the argument for the first time that *Descamps v. United States*, 133 S. Ct. 2276 (2013), prohibited the agency from using the modified categorical approach to determine whether his conviction for criminal sale of a controlled substance was an aggravated felony.

The Second Circuit agreed with the circuits that had addressed the issue and conclude that "[w]here the agency properly applies its own waiver rule and refuses to consider the merits of an argument that was not raised [before the IJ], we will not permit an end run around those discretionary agency procedures by addressing the argument for the first time in a petition for judicial review," quoting *Pinos –Gonzalez, v. Mukasey*, 519 F.3d 436, 440 (8th Cir.2008). The court explained that since the BIA is an appellate body, "it is a basic rule of appellate review, judicial or administrative, that the appellate body may conclude that an argument not advanced before a lower court has been waived."

"It is a basic rule of appellate review, judicial or administrative, that the appellate body may conclude that an argument not advanced before a lower court has been waived."

Consequently, the court declined to address petitioner's *Descamps* argument and dismissed the petition for lack jurisdiction.

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■ Second Circuit Concludes BIA's Interpretation of "Crime of Child Abuse" under INA § 237(a)(2)(E)(i) Is Entitled to *Chevron* Deference

In ***Florez v. Holder***, 779 F.3d 207 (2d Cir. 2015) (*Jacobs*, Livingston, Lohier) the Second Circuit, in an issue of first impression, deferred to the BIA's interpretation of "crime of child abuse" under INA § 237(a)(2)(E)(i), as set forth in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), and *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). In these two decisions the BIA defined "the term 'crime of child abuse' broadly to mean any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation." In *Soram*, the BIA clarified that its definition encompassed endangerment-type crimes, and was not limited to offenses requiring proof of injury to the child."

The petitioner, a citizen of Honduras and an LPR, was twice convicted of endangering the welfare of a child in violation of New York Penal Law § 260.10(1). The second conviction, in 2010, resulted from petitioner's driving under the influence of alcohol while his two children, aged one and nine, were in the car. In removal proceedings, petitioners admitted the factual allegations, but he denied that he was removable under § 237(a)(2)(E)(i). An IJ, relying on BIA precedents found petitioner removable as charged and the BIA affirmed, reasoning that petitioner's case was controlled by *Soram*.

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The court found that the statutory phrase "crime of child abuse," was "a creature of the INA," and therefore the BIA's interpretation of the phrase was entitled to *Chevron* deference if "based on a permissible construction of the statute." Applying the *Chevron* analysis, the court first found that the statutory phrase was ambiguous, noting that state and federal statutes, both civil and criminal, offer varied definitions of child abuse. Second, the court determined that, although the BIA's definition was "broad," it was "at least grounded in reason." The court noted in particular, that in 1996 when Congress made child abuse a removable offense, at least nine states had child abuse crimes "for which injury was not a required element." Accordingly, the court held that the BIA's interpretation was a "reasonable reading of a statutory ambiguity" and entitled to *Chevron* deference.

The court found that the statutory phrase "crime of child abuse," was "a creature of the INA," and therefore the BIA's interpretation of the phrase was entitled to Chevron deference if "based on a permissible construction of the statute."

The court disagreed with the Tenth Circuit's contrary interpretation in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), noting that it was up to the BIA "in the first instance -- and not the federal courts -- to fill interpretive gaps left by Congress in the INA."

On the merits, petitioner had conceded that the BIA's definition as clarified in *Soram* was broad enough to include convictions under NY Penal Law § 260.10(1). Accordingly, the court denied the petition for review.

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FOURTH CIRCUIT

■ Fourth Circuit Holds Alien Failed to Establish Good Moral Character

In ***Tiscareno-Garcia v. Holder***, 780 F.3d 205 (4th Cir. 2015) (*Traxler,* King, Thacker), the Fourth Circuit held that petitioner, a Mexican citizen, failed to establish good moral character as required for cancellation of removal.

The petitioner was apprehended three times for being in the United States unlawfully and each time he was granted voluntary departure. The fourth time that he entered without authorization, he avoided apprehension for ten years. On November 15, 2010, petition was arrested during a work-place inspection and prosecuted for illegal entry under INA § 275(a) a misdemeanor offense. In March 2011, petitioner pled guilty and served 181 days. Before he went to jail, DHS served him with an NTA charging him with removal as an alien present in the U.S. without being admitted or paroled. Petitioner then applied for cancellation of removal claiming hardship to his citizen children, especially his 10-year-old autistic son. The IJ pretermitted the claim and found petitioner statutorily ineligible for cancellation because he could not establish good moral character under the plain language of INA § 101(f)(7), because he had been confined for 180 days or more. The BIA affirmed, noting that the applicability of § 101(f)(7) did not depend upon the type of offense.

The court agreed with the BIA that under § 101(f)(7), it is the length of the incarceration, here, 181 days, rather than the category of the offense, here, a misdemeanor, that is controlling. The court held that application of the statute to an illegal entry, which does not itself categorically bar a finding of good moral character, does not produce an absurd result. The court declined to address petitioner's argument that because he had begun and completed his period of confinement after DHS served him with an NTA, he had not served his imprisonment during the 10-year period for establishing good moral character. The court said that this argument had not been raised to the BIA , and it also appeared to conflict with the BIA's position that such period ends with the entry of a final administrative decision.

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FIFTH CIRCUIT

■ Fifth Circuit Affords *Skidmore* Deference to Non-Precedential BIA's Decision and *Chevron* Deference to Precedential BIA Decision Interpreting the Ten Year Good Moral Character Requirement

In ***Rodriguez-Avalos v. Holder***, 780 F.3d 308 (5th Cir. 2015) (Davis, Dennis,Costa) (*per curiam*), the Fifth Circuit afforded *Skidmore* deference to the BIA's non-precedential determination that INA § 101(f)(7) applies regardless of the nature of the underlying offenses, rejecting petitioner's argument that § 101(f)(7) requires crimes involving moral turpitude.

The petitioner a Mexican citizen, who entered the U.S. without having been admitted or paroled, was indicted on May 18, 2011, and charged with, *inter alia*, falsely and willfully representing himself to be a United States citizen in violation of 18 U.S.C. § 911. On October 11, 2011, in the United States District Court of Nebraska, petitioner pleaded guilty to having committed a § 911 offense. He was sentenced on January 18,

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2012, to fourteen months of imprisonment. Petitioner later testified during immigration proceedings that he served "about seven" months of his sentence before being released. On November 28, 2012, the DHS placed petitioner in removal proceedings, where he conceded the charges of removability, but sought cancellation of removal asserting that his removal to Mexico would result in hardship to his three U.S. citizen children. An IJ found petitioner removable as charged and denied cancellation because petitioner had spent "at least the last six months in custody for a conviction," and therefore could not demonstrate the statutorily required good moral character. On appeal, the BIA, in a single-judge opinion, agreed with the IJ's determination.

The Fifth Circuit preliminarily determined that since the BIA nonprecedential opinion was rendered by a single-judge who did not cite any binding precedents on the issue of whether § 101(f)(7) requires crimes involving moral turpitude, the court would the apply the *Skidmore* standard of review to the BIA's statutory interpretation. The court then found that, the BIA's interpretation of § 101 (f)(7) was a "reasonable, logical reading of the statute's text."

The court also afforded *Chevron* deference to the BIA's interpretation in *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), holding that the period for measuring good moral character is the ten years immediately preceding the final administrative decision by the agency. "The BIA's interpretation of these provisions was 'based on a permissible construction of the statute,' it is not "arbitrary or capricious," said the court.

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SIXTH CIRCUIT

■ Sixth Circuit Holds Alien Failed to Show Agency Employed Improper Standard for Cancellation of Removal

In *Montanez-Gonzalez v. Holder*, __ F.3d __, 2015 WL 1061985 (6th Cir., March 12, 2015), (*Stranch*, Gibbons, Reeves (by designation)), the Sixth Circuit affirmed the agency's denial of cancellation of removal because the Mexican alien failed to sufficiently establish continuous presence and hardship. The court rejected the alien's contention that the IJ's use of the introductory term "on balance" indicated the application of a balancing approach, contrary to binding precedent, in analyzing hardship. The court also rejected petitioner's due process claim, based on the rejection of untimely-submitted evidence, concluding that the alien failed to establish prejudice.

The court held that it was "not an abuse of discretion for an IJ to deny a continuance based on the speculative nature of an unfiled I-130."

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SEVENTH CIRCUIT

■ Seventh Circuit Holds IJ Did Not Abuse His Discretion in Denying Request for Continuance to Await the Filing of a Second Immediate Relative Visa Petition

In ***Souley v. Holder***, 779 F.3d 720 (7th Cir. 2015) (Posner, Kanne, Tinder) (*per curiam*), the Seventh Circuit held that it was not an abuse of discretion for the IJ to deny a continuance based on a yet-to-be-filed visa petition.

The petitioner, a citizen of Niger, challenged the denial of his request to continue his removal proceedings to give his U.S. citizen wife time to file a second I–130 visa petition on his behalf. DHS had already denied her first petition because petitioner had not shown by clear and convincing evidence that the marriage was bona fide and entered into in good faith. No appeal was filed from that first denial.

The court held that it was "not an abuse of discretion for an IJ to deny a continuance based on the speculative nature of an unfiled I-130." The court also found that the IJ properly relied on the denial petitioner's ex-wife first I–130 petition as a basis to conclude that good cause did not exist to grant the continuance. The denial of a prior visa petition was "highly relevant to whether good cause exists to continue removal proceedings to await adjudication of a second petition," said the court. Finally, the court concluded that nothing in the record suggested that the petitioner had been prejudiced by the IJ's denial.

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■ IJ Did Not Abuse His Discretion in Denying Last-Minute Request for a Continuance

In ***Bouras v. Holder***, 779 F.3d 665 (7th Cir. 2015) (Sykes, *Hamilton*, and Posner (dissenting)), the Seventh Circuit held that the IJ did not abuse his discretion in denying the petitioner's request for a continuance to obtain witness testimony in support of relief, where the request was made at the close of the merits hearing, and the alien failed to show that the testimony would have significantly fa-

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vored him or he made a good-faith effort to secure it.

The petitioner, a citizen of Algeria, was granted status as a conditional permanent resident based on his marriage to a U.S. citizen. That marriage ended by divorce before petitioner had obtained his LPR status. He was later placed in removal proceedings after he failed to convince the USCIS that he had entered the marriage in good faith.

When placed in removal proceedings, petitioner sought a discretionary waiver available to aliens who can show that they entered in good faith marriage. Petitioner, at the end of the hearing, also sought a continuance so that his ex-wife could testify as well. The immigration judge denied that request, saying that no "extenuating circumstances" justified a continuance. The IJ denied the request for a waiver and also found that petitioner had not established that the marriage had been in good faith. On appeal, the BIA upheld the IJ's decision.

In his petition for review, petitioner only argued that he should have been granted a continuance so that his ex-wife could testify on his behalf. The court found that it had jurisdiction to review that denial, noting at the same time that it lacked jurisdiction to review the discretionary denial of the good-faith marriage waiver. Petitioner's principal contention is that the IJ had improperly denied the continuance based on "case completion goals." The court concluded that petitioner had not shown good cause for a continuance because he did not demonstrate that his ex-wife's "testimony would have been significantly favorable to him and that he made a good-faith effort to obtain her appearance."

In a dissenting opinion, Judge Posner noted that if "the marriage wasn't a sham, it must have been in good faith," and therefore the BIA "ratified a procedural error by the immigration judge that seriously prejudiced the immigrant." Judge Posner was critical of petitioner's lawyer and of the immigration bar noting that while "[t]here are some first-rate immigration lawyers, especially at law schools that have clinical programs in immigration law, [] on the whole the bar that defends immigrants in deportation proceedings . . . is weak—inevitably, because most such immigrants are impecunious and there is no government funding for their lawyers. This will not trouble judges so enamored of the adversary system in its pristine purity that they do not blanch when an imbalance in the skills of the adversaries' lawyers produces an unjust result."

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds Asylum Applicant Failed to Establish Membership in a Particular Social Group Based on Fear of Gang Recruitment**

In ***Juarez Chilel v. Holder***, 779 F.3d 850 (8th Cir. 2015)(Bye, Smith, *Kelly*), the Eighth Circuit held that substantial evidence supported the denial of withholding of removal a proposed social group of "those who refuse to join a gang and suffer from threats of violence" lacked immutability, particularity, and social distinction.

The petitioner, a Guatemalan citizen who was taken into ICE custody after being arrested and charged with providing false information and having forged identification, conceded that he was subject to removal, but applied for asylum, withholding and CAT protection. He claimed that he had experienced past persecution and has a well-founded fear of future persecution not only because he refused to join a gang. He asserted that he is part of a "social group" made up of individuals who are victims of gang violence. The IJ denied asylum as time-barred, and also denied the request for withholding and CAT. On appeal, the BIA affirmed the IJ, finding that petitioner had failed to demonstrate changed circumstances under INA § 208(a)(2)(D) and that he failed to establish his membership in a distinct social group for purposes of his request for withholding. The BIA also found that petitioner's CAT claim was without a factual basis, as he failed to establish the Guatemalan government harmed him.

The Eighth Circuit first ruled that under INA § 208(a)(3) it lacked jurisdiction to review the "BIA's discretionary factual determination" that petitioner had failed to prove changed country circumstances to cure his untimely application. Second, the court rejected petitioner's proposed social group because he "offered no evidence to support the conclusion that his purported group — those who refuse to join a gang and suffer from threats of violence as a result — shares 'a common immutable characteristic,' is 'defined with particularity,' or is sufficiently socially distinct to qualify as a 'particular social group.'"

Third, the court declined to consider petitioner unexhausted claims that he also belongs to another distinct social group, the Mam

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ethnic group because he had failed to exhaust his administrative remedies on this issue. The court rejected petitioner's contention that once he testified that he spoke both Spanish and Mam, the IJ had a duty to develop the record regarding this potential social group. Finally, the court found that there was no evidence to support petitioner's assertion of future torture from gang violence, and that the Guatemalan government acquiesces in the torture of people like him — those who resist gang violence.

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■ **Eighth Circuit Holds Alien Failed to Establish that IJ Abused Discretion in Denying Thirteenth Continuance**

In ***Mogeni v. Holder***, 779 F.3d 847 (8th Cir. 2015)(Murphy, *Melloy*, Benton), the Eighth Circuit held that the IJ did not abuse his discretion in denying petitioner's thirteenth motion for continuance of his proceedings.

The petitioner, a Kenyan citizen, entered the United States as a visitor but did not depart when his visa expired on May 31, 2003. Instead, on June 11, 2003, he married a U.S. citizen who filed an I-130 petition on his behalf. DHS found that the marriage was a sham entered into for an immigration benefit and denied the petition. Petitioner and his spouse divorced in December 2004. Three months later, petitioner married another U.S. citizen who also filed another I-130. Because the DHS previously found petitioner had entered into a sham marriage to obtain an immigration benefit, the DHS denied the second I–130 petition. Petitioner then appealed the DHS's decision. I

n December 2006, the DHS initiated removal proceedings against the petitioner on the basis that he had overstayed his visa. With the assistance of counsel, he sought continuance of the removal proceedings pending the results of his I–130 petitions. Between 2007 and 2012, the IJ granted petitioner twelve continuances. The IJ denied petitioner's thirteenth request for a continuance, finding that he did not demonstrate "good cause." The IJ noted that because of the DHS's sham marriage determination, § 204(c) of the INA—intended to prohibit the approval of a petition for an alien whose prior marriage was determined to have been entered into for the purpose of evading immigration laws—diminished petitioner's likelihood of success on either pending I–130 petition. The IJ ordered petitioner removed. The BIA affirmed on similar grounds

The court noted that "Congress required the Attorney General to impose mandatory detention for aliens like [petitioner] who were convicted of certain crimes."

In upholding the denial of continuance, the Eight Circuit explained that an important consideration in determining whether to grant a stay of removal proceedings pending the resolution of an I–130 petition is the likelihood of the petition's success. "Because the DHS determined Mogeni previously entered into a sham marriage, § 204 (c) substantially hinders the likelihood of success," said the court. Accordingly, the court found that the BIA had not abused its discretion.

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TENTH CIRCUIT

■ **Tenth Circuit Finds Mandatory Detention Statute Ambiguous, Defers to BIA in *Matter of Rojas***

In ***Olmos v. Holder***, __F.3d__, 2015 WL 1296598 (Briscoe, *Bacharach*, Holmes, JJ.) (10th Cir. March 24, 2015), the Tenth Circuit deferred to the BIA's interpretation in *Matter of Rojas* 23 I&N Dec. 117, 125 (BIA 2001), that mandatory detention under INA § 236(c) applies to criminal and terrorist aliens during their removal proceedings, even if immigration officials fail to take them into custody immediately upon their release from prior custody. The court, citing *Chevron*, found the statute ambiguous and the agency's interpretation reasonable.

The petitioner, a citizen of Mexico, was convicted on state charges involving identity theft, providing false information to a pawnbroker, and forgery of a government document. Six days after his release on probation DHS officials took him into custody under INA § 236(c). Petitioner then sought a writ of habeas corpus, arguing that he was entitled to a bond hearing after he had been taken into federal custody six days after his release. The district court granted writ, the bond hearing was held, and petitioner was released on $12,000 bond. The government appealed.

In addition to deferring to the BIA's interpretation in *Matter of Rojas*, the Tenth Circuit also noted that "Congress required the Attorney General to impose mandatory detention for aliens like [petitioner] who were convicted of certain crimes; even if the Attorney General failed to fulfill this requirement in a timely manner . . . the statutory requirement would have remained."

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■ **Tenth Circuit Holds Asylum Applicant Failed to Establish El Salvadoran Males Who Resist Gang Recruitment Comprise "Socially Visible" Group, or Nexus Between Proposed Group and Persecution**

In *Rodas-Orellana v. Holder*, 780 F.3d 982 (10th Cir., March 2, 2015) (*Matheson*, Briscoe, Murphy), the Tenth Circuit held that the petitioner, who sought asylum and withholding, failed to establish that his proposed particular social group—"El Salvadoran males threatened and actively recruited by gangs, who resist joining because they oppose the gang"— was perceived as a distinct social group in El Salvador. The court explained that the evidence reflected "generalized gang violence toward anyone resisting their [recruitment] efforts rather than defining a distinct social group." Additionally, the court held that petitioner had "failed to establish that his membership in a particular social group was or will be a 'central reason'" for the gang's actions against him. Finally, court held that remand was not warranted in light of *Matter of M-E-V-G-* and *Matter of W-G-R-*, because those decisions were consistent with the court's past interpretation of "social visibility."

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds Alien Is Barred from Adjustment of Status Because She Knowingly Filed a Frivolous Asylum Application**

In *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284 (11th Cir. 2015) (*Tjoflat*, Julie Carnes, Gilman (by designation)), the Eleventh Circuit concluded that it lacked jurisdiction to review several claims that petitioner had not advanced before the BIA and that the admission of certain documentary evidence did not violate due process. The court also rejected petitioner's argument that the BIA's decision lacked reasoned consideration.

The petitioner, an ethnically Chinese Christian, who was born in Indonesia, first entered the United States as a tourist in 1998, and subsequently enrolled in a community college. She returned to Indonesia in 1990 to attend her grandmother's funeral and to obtain an F-1 visa. While there, she claimed that on one occasion a group of Indonesian men assaulted her and shouted ethnic slurs in a parking lot of a shopping mall. This incident and the encouragement of a student friend, who was also Chinese Christian, convinced her to apply for asylum. Petitioner apparently signed a blank asylum application (I-589), and her friend's boss, Hans Gouw, did the rest, including attaching a Statement to the application. Petitioner was interviewed by an Asylum Officer in 2003 and her application was granted. It turned out that the application and the attached Statement contained some embellished and fraudulent information. Petitioner was served with a notice that INS intended to terminate the asylum status because she had fabricated her asylum claim. Immigration officials had interviewed petitioner's mother, the Department of Justice had indicted her friend and Mr. Gouw for running an asylum fraud ring, among other charges. Following the asylum interview, the AO found that petitioner had submitted a fraudulent asylum application and terminated her asylum status.

The court held that petitioner had "failed to establish that his membership in a particular social group was or will be a 'central reason' for the gang's actions against him."

Petitioner was then placed in removal proceedings on the basis that she had procured asylum by fraud. An IJ determined that petitioner was removable as charged under INA §237(a)(1(A)(B), but gave her an opportunity to apply for withholding. Petitioner then filed a second I-589 and also sought to apply for adjustment based on her recent marriage to a United States citizen. Petitioner then withdrew her application for asylum and withholding. Because an alien who has filed a "frivolous" asylum application is ineligible for adjustment of status, an IJ held a hearing on that issue and heard testimony from the two AOs who had adjudicated the asylum claim. The IJ determined based on their testimony and documentary evidence that petitioner had submitted a frivolous asylum application and was ineligible for adjustment or voluntary departure. On appeal, the BIA rejected petitioner's contention that the INS had not met its burden on the "frivolous" issue and that she had been denied due process because the IJ had made available only copies and not the originals of I-589 and Statement.

Before the Eleventh Circuit, petitioner argued first that she had been blindsided by the "frivolous" finding and the IJ had not given her a sufficient opportunity to account for the discrepancies. The court held that petitioner had not exhausted her claim on this issue because she did not raise it to the BIA in the first instance. The court also rejected petitioner's contention that her due process rights had been violated by the BIA's reliance on the asylum Statement and a Fraud Verification Memo (FVM) submitted by the government, which recounted the *modus operandi* used by Hans Gouw to procure asylum for his clients, The court explained that petitioner had offered no explanation as to how the original of the Statement differed

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materially from a photocopy. The court also determined that, even if there was a due process violation in the admission of the FVM, petitioner had not shown any substantial prejudice. Finally, the court rejected, as "meritless" petitioner's contention that the BIA's decision lacked "reasoned consideration." The court acknowledged that it has remanded cases where "the agency decision is so fundamentally incomplete that a review of the legal and factual determination would be quixotic." However, it reaffirmed its view that the BIA "need not address specifically each claim the petitioner made or each piece of evidence the petitioner submitted."

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DISTRICT COURTS

■ **Eastern District of Missouri Grants Summary Judgment in Government's Favor and Upholds the USCIS Revocation of Visa Petition for Religious Worker**

In *The Redeemed Christian Church of God Jesus House For All Nations v. Citizenship and Immigration Services*, No-02405 (E.D. Mo., March 12, 2015) (*Limbaugh, J.),* the District Court upheld the USCIS's revocation of its approval of the church's petition for a special immigrant religious worker visa. The court concluded that the revocation did not violate the Administrative Procedure Act because substantial evidence supported the agency's findings. The church was unable to overcome two findings from USCIS's compliance review, one indicating that the church was unoccupied, and the other that the church did not comply with the compensation requirements in the immigration regulations.

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■ **Western District of Texas Dismisses Naturalization Suit Based on Fraudulent Marriage, Perjury and False Testimony**

In ***Wade v. Holder***, No. 13-465 (W.D. Tex., November 10, 2014) (*Rodriguez, J.*), the District Court dismissed the alien's complaint under 8 U.S.C. § 1421(c), concluding that the alien was ineligible to naturalize because he engaged in marriage fraud to obtain his legal permanent resident status; testimony from the alien's U.S. citizen ex-wife, and two Government fraud investigators established his intent to evade the immigration laws. The court also found a lack of the required good moral character based on perjury on the alien's tax forms, and false testimony at his naturalization interview.

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■ **Central District of California Upholds Employment-Based Visa Denial for Chinese Real Estate Executive**

In ***A & T Financial Services v. Rosenberg***, No.14-cv-0780 (C.D. Cal., March 1, 2015) (*Stanton, J.*), the Central District of California granted the Government's motion for summary judgment, concluding that United States Citizenship and Immigration Services ("USCIS") properly denied a small "immigrant concierge" company's visa petition for a multinational executive or manager who was previously employed as a Chinese real estate executive. The court determined that USCIS's Administrative Appeals Office properly denied the petition and motion to reopen because the concierge company failed to provide a sufficiently detailed job description for its beneficiary and failed to properly respond to USCIS's request for evidence.

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OIL TRAINING CALENDAR

April 27, 2015. Presenting Effective Oral Argument. 2:00-3:30 LSB 5421. This training is provided by OIL Senior Litigation Counsel Greg Mack.

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■ **District of D.C. Dismisses Challenge to Expedited Removal System**

In ***Dugdale v. CBP***, 14-cv-1175 (D.C.C March 31, 2015) (*Cooper, J.*), the court rejected a challenge to the constitutionality of the expedited removal system. After reviewing plaintiff's thirty-seven separate pleadings, the court ruled that it had limited habeas jurisdiction under the expedited removal statute to review the plaintiff's claim of citizenship, but held that the plaintiff failed to allege sufficient facts to state a claim. The court ruled that plaintiff did state a claim as to alleged procedural irregularities regarding an expedited removal order that was not signed by a supervisor. The court gave CBP fourteen days to respond to certain questions.

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INSIDE OIL

Author and Former IJ Speaks at OIL

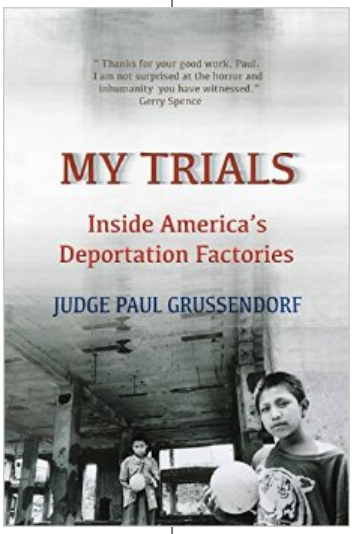
From immigration clinic director, to USCIS refugee officer, to seven years behind the immigration bench, to author, Paul Grussendorf has more than twenty-five years' experience in asylum and refugee law. You might say he's seen everything.

On March 12, 2015, Mr. Grussendorf talked about his book "*My Trials: Inside America's Deportation Factories*," to a group of Office of Immigration Litigation employees eager to hear his wealth of insights into the immigration system, developed over his long and varied career.

At this most recent installation of OIL's popular Brown Bag Lunch and Learn series, the former immigration judge offered anecdotes, "war stories," and even policy recommendations for how to strengthen the U.S. immigration system.

Mr. Grussendorf began his legal career as a senior attorney at the Washington, D.C. Central American Refugee Center. After just one year, he was selected to direct the George Washington University Law School Immigration Law Clinic, a role he held for a decade.

He then embarked on a series of high-profile positions in domestic and international governmental organizations: Election monitor in Nicaragua and Panama under the auspices of the Organization of American States; immigration judge; refugee officer; and legal consultant to the Office of the United Nations High Commissioner on Refugees, among other institutions.



Despite having an almost fantastically broad immigration background, Mr. Grussendorf's tenure as an immigration judge seemed to impact him the most; his talk focused primarily on experiences behind the bench at the San Francisco and Philadelphia Immigration Courts.

His passion for immigration evident, he also spoke enthusiastically of serving as a refugee officer in Africa, Asia, and Cuba to process refugees for resettlement to the United States.

He also emphasized the value of continuing legal education for the bench and bar alike, having taught immigration and refugee law at George Washington University Law School, the University of San Francisco Law School, and Howard University School of Law.

Mr. Grussendorf, most recently worked as a legal consultant to other immigration lawyers and several international refugee agencies. He is currently a Supervisory Adjudication Officer with USCIS.

By Benjamin Mark Moss, OIL

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

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